C.A. Nos. 18-2010, 400-2010

IN THE

UNITED STATES COURT OF APPEALS FOR THE TWELFTH CIRCUIT

CITIZEN ADVOCATES FOR REGULATION AND THE ENVIRONMENT, INC.
Appellant,

-against-

LISA JACKSON, ADMINISTRATOR, U.S. Environmental Protection Agency
Appellee.

-against-

STATE OF NEW UNION,
Intervenor-Appellee.

ON PETITION FOR REVIEW
FROM THE DISTRICT OF NEW UNION

BRIEF FOR APPELLEE

TEAM NUMBER 43
COUNSEL FOR APPELLEE

QUESTIONS PRESENTED

1. Whether RCRA § 7002(a)(2) provides jurisdiction for district courts to order EPA to act on CARE's petition for revocation of EPA's approval of New Union's hazardous waste program, filed pursuant to RCRA § 7004;

2. Whether 28 U.S.C. § 1331 provides jurisdiction for district courts to order EPA to act on CARE's petition for revocation of EPA's approval of New Union's hazardous waste program, filed under 5 U.S.C. § 553(e);

3. Whether EPA's failure to act on CARE's petition that EPA initiate proceedings to consider withdrawing approval of New Union's hazardous waste program under RCRA § 3006(e) constituted a constructive denial of that petition and a constructive determination that New Union's program continued to meet RCRA's criteria for program approval under RCRA § 3006(b), both subject to judicial review under RCRA 7006(b)(1);

4. Assuming the answer to issue 3 is positive and the answer to either or both of issues 1 and 2 is positive, should this Court lift the stay in C.A. No. 18-2010 and proceed with judicial review of EPA's constructive actions or should the Court remand the case to the lower court to order EPA to initiate and complete proceedings to consider withdrawal of its approval of New Union's hazardous waste program;

5. Assuming this Court proceeds to the merits of CARE's challenge, must EPA withdraw its approval of New Union's program because its resources and performance fail to meet RCRA's approval criteria;

6. Assuming this Court proceeds to the merits of CARE's challenge, must EPA withdraw its approval of New Union's program because the New Union 2000 Environmental Regulatory Adjustment Act effectively withdraws railroad hazardous waste facilities from regulation; and

7. Assuming this Court proceeds to the merits of CARE's challenge, must EPA withdraw its approval of New Union's program because the New Union 2000 Environmental Regulatory Adjustment Act renders New Union's program not equivalent to the federal RCRA program, inconsistent with the federal program and other approved state programs, or in violation of the Commerce Clause?

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JURISDICTIONAL STATEMENT

The district court entered summary judgment in favor of Intervenor-Appellants, New Union, on all claims on June 2, 2010. The district court's order granting summary judgment as to all claims and all parties constitutes a final order over which this Court has jurisdiction under 28 U.S.C. § 1291. *Orin v. Barclay*, 272 F.3d 1207, 1214 (9th Cir. 2001). Accordingly, jurisdiction is properly laid before this court.

STATEMENT OF THE CASE

On January 5, 2009, Citizen Advocates for Regulation and the Environment, Inc. ("CARE"), a non-profit corporation in the State of New Union, served a rulemaking petition on the Administrator of the Environmental Protection Agency ("EPA") under the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6974, and the Administrative Procedure Act ("APA"), 5 U.S.C. § 553(e), requesting that the EPA commence proceedings to withdraw its approval of New Union's hazardous waste program. (R. at 4.)

On January 4, 2010, CARE initiated the present action in the district court, alleging that EPA failed to respond to its removal petition, and requested that the district court issue an injunction requiring EPA to act on its rulemaking petition under 42 U.S.C. § 6972(a)(2). (R. at 4.) In the alternative, CARE requested judicial review of EPA's constructive denial of the petition and EPA's constructive determination that New Union's program continued to meet the criteria for EPA approval. (R. at 4.) New Union filed an unopposed motion to intervene pursuant to Fed. R. Civ. P. 24, which the district court granted. (R. at 4.) The parties filed cross motions for summary judgment. (R. at 4.)

With this complaint, CARE simultaneously filed a petition with the Court of Appeals, seeking review of EPA's constructive denial and determination. (R. at 5.) New Union filed an unopposed motion to intervene, which the Court of Appeals granted. (R. at 5.) On EPA's

motion, the Court of Appeals stayed the proceeding, pending the outcome in the district court. (R. at 5.)

The district court granted New Union's motion for summary judgment, finding that it did not have jurisdiction to order the EPA to act on CARE's petition under 42 U.S.C. § 6972(a)(2) or 28 U.S.C. § 1331. (R. at 9.) Specifically, the district court dismissed CARE's petition because EPA's initial approval of New Union's hazardous waste program was an order, rather than rulemaking, and therefore, it was not subject to petition under 42 U.S.C. § 6974 or 5 U.S.C. § 553(e). (R. at 6.) The district court further determined that, even if it ordered the EPA to respond to CARE's petition and EPA subsequently denied the petition, judicial review of EPA's actions would be time barred. (R. at 7). EPA timely appealed the district court's grant of New Union's motion for summary judgment. CARE also appeals the district court's ruling below that it lacked jurisdiction over CARE's rulemaking petition.

STATEMENT OF FACTS

EPA approved New Union's hazardous waste program in 1986. (Rec. doc. 2, p. 1.) At that time, New Union's program met all RCRA statutory requirements and EPA's regulatory criteria for approval—the New Union DEP had sufficient resources to administer and enforce the program, issue permits in a timely fashion, inspect RCRA facilities every other year, and initiate enforcement actions against violators. (Rec. doc. 2, p. 1.) Since then, the New Union DEP's resources have slowly decreased, while the number of RCRA-regulated facilities in New Union has gradually increased. (Rec. doc. 4 for 2009, p. 23.)

In 2000, the New Union legislature enacted the Environmental Regulatory Adjustment Act ("ERAA"), which contained amendments to both the Railroad Regulation Act ("RAA") and the state hazardous waste regulations concerning Pollutant X. (Rec. doc. 4 for 2000, pp. 103-105.) The first relevant portion of the ERAA amended the RAA to give the New Union

Railroad Commission—a state agency in New Union—control over all standard setting, permitting, inspection, and enforcement authorities of the New Union DEP under state environmental statutes. (Rec. doc. 4 for 2000, pp. 103-105.) The amendment also removed criminal sanctions for railroad-related environmental violations under state environmental statutes. (Rec. doc. 4 for 2000, pp. 103-105.) The record does not indicate that permitting, inspection and enforcement at facilities under the New Union Railroad Commission's jurisdiction has been in any way insufficient, despite the removal of criminal sanctions.

The second portion of the ERAA implemented a phased prohibition on the generation, storage, or disposal of Pollutant X in New Union. (Rec. doc. 4 for 2000, pp. 105-107.) Pollutant X is one of the most dangerous substances known to Man, and one that poses a major hazard to public health and the environment. There are only nine disposal sites nationwide for Pollutant X. The ERAA explicitly permits the transportation in commerce of pollutant X through New Union, but requires transporters of Pollutant X to travel through the state as quickly and directly as is "reasonably possible." (Rec. doc. 4 for 2000, pp. 105-107.)

In 2009, the New Union DEP, due to the ongoing New Union budget crisis, requested EPA assistance in its permitting, inspection and enforcement regime. (Rec. doc. 4 for 2009, p. 23.) At present, responsibility for inspections and enforcement is split 50-50 between the New Union DEP and EPA. (Rec. doc. 4 for 2009, p. 25.) An average of six citizen suits are filed per year, supplementing EPA and DEP's enforcement actions. (Rec. doc. 4 for 2009, p. 26.)

STANDARD OF REVIEW

Federal appellate courts review the grant of summary judgment de novo, using the same standards as the trial court. *Bruh v. Bessemer Venture Partners III L.P.*, 464 F.3d 202, 205 (2d Cir. 2006), *cert. denied*, 549 U.S. 1209 (2007). Summary judgment is appropriate where "there is no genuine issue as to any material fact." Fed. R. Civ. P. 56.

SUMMARY OF THE ARGUMENT

The district court has jurisdiction under RCRA, 42 U.S.C. § 6972(a)(2), to order EPA to respond to CARE's removal petition. Pursuant to 42 U.S.C. § 6974, CARE petitioned EPA to withdraw its approval of New Union's hazardous waste program. Since EPA's initial approval of New Union's hazardous waste program was a legislative rulemaking, that approval may be subject to Section 6974 petitions. Given that Section 6974 requires the EPA Administrator to respond to all petitions, and EPA has not yet responded to CARE's petition, the district court may order EPA to respond to CARE's petition. However, the district court does not have jurisdiction under 28 U.S.C. § 1331 to order EPA to respond to CARE's removal petition. Even though EPA's approval of New Union's program was a legislative rulemaking, RCRA provides a specific right for rulemaking petitions that displaces the general right to make rulemaking petitions under the APA, 5 U.S.C. § 553(e).

EPA's decision to ignore CARE's petition fell squarely within EPA's statutorily granted discretion and did not constitute a constructive denial of that petition. Multiple Circuits Courts have held that the word "whenever," in both RCRA and other environmental statutes, gives EPA unreviewable discretion in deciding whether to begin proceedings against states for violations of environmental statutes. Because 42 U.S.C. § 6926(e) commits the decision of whether to begin proceedings to the discretion of the Administrator, 5 U.S.C. § 701(a) prohibits judicial review.

Even if EPA's decision refusing to initiate an enforcement action is reviewable, the lack of substantive law for this Court to apply precludes judicial review. The legislative history and text of RCRA are silent as to when EPA must commence withdrawal proceedings, which confirms that EPA has substantial discretion to decide when to commence withdrawal proceedings. Provided that this Court decides that EPA's decision not to initiate enforcement proceedings is a reviewable action, this Court should not lift the stay, but instead, should rather

remand the action to the district with instructions to have EPA initiate and complete proceedings in conjunction with 40 C.F.R. § 271.23. If EPA did in fact constructively deny CARE's petition, it did so in an arbitrary and capricious manner because it did not follow any of the procedures required in 42 U.S.C. § 6926(e). Therefore, the only way to rectify these procedural errors is to remand the case back to the district court with instructions for EPA to follow the statutory procedures.

EPA is not required to withdraw its authorization of New Union's hazardous waste program, even if this Court finds that a constructive denial occurred. The EPA Administrator has discretion to determine when to commence withdrawal proceedings in response to removal petitions. For EPA authorization of New Union's program to be withdrawn, the EPA Administrator must find that New Union "failed" to exercise control over its hazardous waste program. RCRA does not define what "failure" is, nor are there any objective standards for "failure" in the regulation. Thus, the decision to withdraw authorization is committed to EPA discretion precisely because it is a complicated, fact-based decision, which should be entitled to administrative deference.

The ERAA's amendments concerning the treatment of railroad hazardous waste are not inconsistent with federal RCRA standards. Though the ERAA reduces penalties for railroad-related environmental violations in New Union, it does not conflict with federal penalties for environmental violations under RCRA. The joint federal-state nature of RCRA allows EPA to pursue criminal enforcement actions for violations of federal law, despite the existence of a parallel penalty scheme under state law.

The ERAA's amendments concerning the regulation of Pollutant X do not violate federal RCRA standards or the Commerce Clause. RCRA sets a federal baseline for state RCRA

programs, and explicitly permits state programs to exceed the federal standard. New Union's Pollutant X standard is an example of this. New Union's regulation of Pollutant X does not violate the Commerce Clause because the more stringent regulations only govern the treatment, storage, and disposal of Pollutant X. The regulations do not impermissibly distinguish between in-state and out-of-state generators of Pollutant X.

ARGUMENT

I. THE DISTRICT COURT HAS JURISDICTION OVER CARE'S PETITION FOR REVOCATION OF EPA APPROVAL FOR NEW UNION'S HAZARDOUS WASTE PROGRAM.

The district court held that it lacked jurisdiction to order EPA to act on CARE's petition under 42 U.S.C. § 6972(a)(2) or 28 U.S.C. § 1331. However, the district court has jurisdiction under RCRA, 42 U.S.C. § 6972(a)(2), but not under 28 U.S.C. § 1331, to order EPA to respond to CARE's removal petition.

A. 42 U.S.C. § 6972(a)(2) Provides Jurisdiction for the District Court to Order the EPA to Respond to CARE's Petition.

RCRA provides the district court with subject matter jurisdiction to adjudicate claims "where there is alleged a failure of [EPA] to perform any act or duty under this chapter which is not discretionary with [EPA]," 42 U.S.C. § 6972(a)(2), and permits the district court "to order [EPA] to perform the act or duty." *Id.* § 6972(a). A party may only bring challenges asserting a clear-cut failure of EPA to perform a nondiscretionary duty. *Sierra Club v. Thomas*, 828 F.2d 783, 790 (D.C. Cir. 1987). Section 6972(a)(2) allows suits to compel EPA to perform nondiscretionary duties; it does not grant the district court authority to review the substance or implementation of the performance of a nondiscretionary duty. *See Envtl. Def. Fund v. Gorsuch*, 713 F.2d 802, 812-13 (D.C. Cir. 1983).

CARE sought to order the EPA Administrator to perform her nondiscretionary duty under RCRA, 42 U.S.C. § 6974, to timely respond to petitions for revocation of regulations as required by the Act.[1] Instead, the district court incorrectly held that it lacked jurisdiction over CARE's petition under 42 U.S.C. § 6972(a)(2), and consequently, dismissed the petition because it determined that EPA's initial approval of New Union's hazardous waste program was an order, rather than rulemaking. (R. at 7.) However, the district court's determination is incorrect.

1. RCRA Does Not Command EPA To Issue An Order To Approve State RCRA Programs.

RCRA does not specify whether EPA must use a rulemaking process or issue an order to approve State RCRA programs. *See* 42 U.S.C. § 6926(a). As such, when Congress has not explicitly spoken to what a federal agency is required to do in a federal statute, the agency can interpret the meaning of the ambiguous provision. *Chevron U.S.A., Inc. v. NRDC,* 467 U.S. 837, 865-66 (1984). If a federal agency's interpretation of the statute's provision is presumptively reasonable, then the Court will defer to the agency's interpretation. *Id.* at 842-43 ("[I]f the statute is silent or ambiguous with respect to the specific question, the issue for the court is whether the agency's answer is based on a permissible construction of the statute.").

42 U.S.C. § 6926(a) sets out the requirements for EPA approval and authorization of State RCRA programs, and EPA has interpreted that its approval or authorization of a State RCRA program under this section is always a rulemaking process through which EPA delegates the primary responsibility of implementing the RCRA hazardous waste program to individual states in lieu of EPA. *See* EPA, RCRA Orientation Manual 137-42 (2006). *See, e.g.,* Georgia: Decision on Final Authorization of State Hazardous Waste Management Program, 49 Fed. Reg. 31,417 (Aug. 7, 1984); Michigan: Final Authorization of State Hazardous Waste Management

[1] In its summary judgment motion, Intervenor-Appellee New Union concedes that the EPA Administrator has a duty to respond to rulemaking petitions under 42 U.S.C. § 6974. (R. at 7.)

Program, 51 Fed. Reg. 36,804 (Oct. 16, 1986); Hawaii: Final Authorization of State Hazardous Waste Management Program, 66 Fed. Reg. 55,115 (Nov. 1, 2001). As such, EPA's interpretation of Section 6926(a) is entitled to *Chevron* deference because the statute is silent, and its interpretation is permissible.

2. EPA's initial approval of New Union's Hazardous Waste Program was a rulemaking, not an order.

An agency engages in legislative rulemaking when its decision is issued pursuant to statutory authority and creates rights, assigns duties, or imposes new standards or other affirmative obligations not already outlined in the law. *Warder v. Shalala*, 149 F.3d 73, 80 (1st Cir. 1998). Important to this analysis is also whether the agency intends for the regulation to have legislative effect. *Levesque v. Block*, 723 F.2d 175, 182-83 (1st Cir. 1983).

EPA's authorization of New Union's hazardous waste program in 1986 makes clear that EPA intended to use its legislative rulemaking authority in its initial approval of New Union's program. First, EPA subjected the approval of New Union's program to notice and comment procedures, and incorporated the result in 40 C.F.R. 272. (R. at 6.) The use of notice and comment requirements signifies that the EPA believed it was engaging in rulemaking when it approved New Union's program. *See Lincoln v. Vigil*, 508 U.S. 196 (1993) (noting that notice and comment requirements only apply to so-called legislative rules). Second, EPA approved the New Union program in fulfillment of its statutory function under RCRA. *See* 42 U.S.C. § 6926(b) (directing the EPA to make findings as to whether the state program is equivalent to and consistent with the federal program). As a result, EPA's initial approval of New Union's hazardous waste program was a rulemaking process through which EPA delegated the primary responsibility of implementing the RCRA hazardous waste program to New Union.

B. 28 U.S.C. § 1331 Does Not Provide Jurisdiction for the District Court to Order the EPA to Respond to CARE's Petition.

The district court correctly held that it lacked federal question jurisdiction over CARE's petition for revocation under 28 U.S.C. § 1331. Even assuming that EPA's initial approval of New Union's hazardous waste program was a rulemaking, EPA's alleged failure to respond to CARE's petition cannot constitute a violation of both RCRA, 42 U.S.C. § 6974, and the APA, 5 U.S.C. § 553(e). First, the specific command in Section 6974 of RCRA displaces Section 553(e) of the APA since both Section 6974 and Section 553(e) permit interested persons to file petitions to make, amend, or repeal EPA rulemakings. *See Green v. Bock Laundry Machine Co.,* 490 U.S. 504, 524-25 (1989) (holding that the specific command in Rule 609 of the Federal Rules of Evidence forecloses the general command for a judicial exercise of discretion under Rule 403.) Section 6974 provides explicit authority for persons to make rulemaking petitions under RCRA, while Section 553(e) only provides a general right for persons to make rulemaking petitions in federal agencies. As a result, EPA's alleged failure to respond to CARE's petition may violate Section 6974, but cannot also Section 553(e). Second, Section 553(e) provides that interested persons can file petitions to make, amend, or repeal agency rulemakings, but does not explicitly require the federal agency to take any action with respect to the petition. *See* 5 U.S.C. § 553(e). Because Section 553(e) does not require any agency action or response, it cannot support an action for an injunction requiring EPA to act on CARE's petition.

II. EPA'S DECISION NOT TO INITIATE ENFORCEMENT PROCEEDINGS FOR CARE'S PETITION IS NOT A CONSTRUCTIVE DENIAL, BUT RATHER AN UNREVIEWABLE ACT OF AGENCY DISCRETION.

42 U.S.C. § 6976(b) grants courts judicial review of the EPA Administrator's action only "in granting, denying, or withdrawing authorization or interim authorization under" 42 U.S.C. § 6926. 42 U.S.C. § 6976(b). Once the Administrator had initiated a public hearing to decide

that a state is no longer administering or enforcing an authorized disposal program, 42 U.S.C. § 6926(e) requires the Administrator to 1) "notify the State [in writing] and, if appropriate corrective action is not taken within a reasonable time, not to exceed ninety days," 2) "the Administrator shall withdraw authorization of such program," and 3) "establish a Federal program pursuant to this subchapter." 42 U.S.C. § 6926(e). In other words, once the Administrator has commenced a public hearing, the statute does not leave the Administrator any room for discretion, mandating that the Administrator "shall" notify the State and "shall" withdraw authorization.

However, RCRA grants the Administrator discretion in determining whether to call a public hearing in the first place. *See* 42 U.S.C. § 6926(e) (stating that the language above applies "whenever" the Administrator calls a hearing, but not mandating a hearing); *see also* 40 C.F.R. § 271.23(b) (2005) (stating that the commencement of withdrawal proceedings is a discretionary act of the Administrator). Because of this statutory language, the court lacks subject matter jurisdiction over CARE's challenge to EPA's decision not to commence withdrawal proceedings through a public hearing because the determination was fully committed to EPA's discretion.

Subject matter jurisdiction is a threshold requirement imposed by Article III. *See Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 701-02 (2009); U.S. Const. Art. III, § 2, cl. 1 (conferring jurisdiction on federal district courts over cases "arising under . . . the laws of the United States"). While congressional authorization for federal courts to review agency action is provided by the general "federal question" provision in 28 U.S.C. § 1331, the APA serves as a "jurisdictional predicate" to such review. *See Bowen v. Massachusetts*, 487 U.S. 879, 891 n. 16 (1988) ("[I]t is common ground that if review is proper under the APA, the District Court had jurisdiction under 28 U.S.C. § 1331."). The APA bars

subject matter jurisdiction "to the extent that–(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law." 5 U.S.C. § 701(a). *See, e.g., Ellison v. Connor*, 153 F.3d 247, 254 (5th Cir. 1998) (affirming dismissal for lack of subject matter jurisdiction where action was committed to agency discretion).

A. CARE's Petition Falls Under the Committed-to-Agency-Discretion Exception.

As is the case here, courts lack jurisdiction under the APA, 5 U.S.C. § 701(a)(2), where "statutes are drawn in such broad terms that in a given case there is no law to apply." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971) (internal quotation and citation omitted), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99, 105 (1977). This exception does not require evidence of congressional "intent to preclude judicial review," rather "even where Congress has not affirmatively precluded review, review is not to be had if the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." *Heckler v. Chaney*, 470 U.S. 821, 830 (1985); *see also Drake v. FAA*, 291 F.3d 59, 70 (D.C. Cir. 2002) ("Since the Court's decision in *Overton Park*, the 'no law to apply' formula has come to refer to the search for substantive legal criteria against which an agency's conduct can be seriously evaluated.").

Although generally there is a strong presumption that Congress intends judicial review of administrative action, the Supreme Court explained in *Heckler* that there is a presumption of *unreviewability* of "an agency's decision not to take enforcement action." *Heckler*, 470 U.S. at 821. Like this case, *Heckler* involved an agency's decision not to invoke a statutory enforcement mechanism, and the Supreme Court noted that such a decision requires balancing many considerations:

> First, an agency decision not to enforce often involves a complicated balancing of a number of factors, which are peculiarly within its expertise. Thus, the agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all. An agency generally cannot act against each technical violation of the statute it is charged with enforcing. The agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities.

Id. at 831-32; *see also, e.g., Hinck v. United States*, 550 U.S. 501, 504 (2007) (holding that decision whether to abate interest owed by delinquent taxpayers is committed to IRS's discretion); *S. Ry. Co. v. Seaboard Allied Mining Corp.*, 442 U.S. 444, 457, 461 (1979) (holding that ICC decision not to suspend proposed rates submitted by railroads was committed to agency discretion, and noting potential disruptive consequences of judicial review); *Ohio Pub. Interest Research Group, Inc. v. Whitman*, 386 F.3d 792, 799 (6th Cir. 2004) ("We are unable to review the EPA's refusal to issue a NOD, as the determination upon which its issuance hinges is committed to agency discretion by law, and the Act leaves us with no standards by which to judge the EPA's non-enforcement decision."); *Pub. Citizen, Inc. v. EPA*, 343 F.3d 449, 464 (5th Cir. 2003) ("'The presumption against judicial review of such refusal avoids entangling courts in a calculus involving variables better appreciated by the agency charged with enforcing the statute and respects the deference often due to an agency's construction of its governing statutes.'" (quoting *N.Y. Pub. Interest Research Group v. Whitman*, 321 F.3d 316, 331 (2d Cir. 2003))); *Sierra Club v. Whitman*, 268 F.3d 898, 902-06 (9th Cir. 2001) (rejecting the notion that the EPA Administrator was required to make findings because the word "whenever" provided unreviewable discretion in interpreting 33 U.S.C. § 1365(a)(2)); *Her Majesty the Queen in Right of Ontario v. EPA*, 912 F.2d 1525, 1533 (D.C. Cir. 1990) ("The words 'whenever' the Administrator 'has reason to believe' imply a degree of discretion underlying the endangerment

finding. Once that finding is made, however, the remedial action that follows is both specific and mandatory-the Administrator 'shall' notify the Governor of the specific State emitting the pollution and require it to revise its SIP.")

Regardless of which way the presumption cuts, to determine whether there is substantive law to apply this Court first "careful[ly] examin[es] . . . the statute on which the claim of agency illegality is based." *Ellison v. Connor*, 153 F.3d 247, 251 (5th Cir. 1998) (quoting *Webster v. Doe,* 486 U.S. 592, 600 (1988)); *see also, e.g., Pac. Nw. Generating Coop. v. Dep't of Energy*, 580 F.3d 792, 806 (9th Cir. 2009); *Tamenut v. Mukasey*, 521 F.3d 1000, 1003-04 (8th Cir. 2008) ("The absence of any statutory factors to guide the agency's decision-making process, in combination with the open-ended nature of the inquiry, generally supports the conclusion that the agency action is committed to agency discretion by law." (internal quotation and citation omitted)). "An agency's own regulations can provide the requisite law to apply." *Ellison*, 153 F.3d at 251. Following Supreme Court precedent, courts also examine the practical consequences of allowing review. *Id.* at 252 ("[T]here must be a weighing of the need for, and feasibility of, judicial review versus the potential for disruption of the administrative process." (internal quotation and citation omitted)); *see also Pac. Nw. Generating Coop.*, 580 F.3d at 806 ("When relevant statutes are silent on the salient question, we assume that Congress has implicitly left a void for [the] agency to fill, and, therefore, we defer to the agency's construction of its governing statutes, unless that construction is unreasonable." (internal quotation and citation omitted)).

B. The EPA Administrator's Refusal to Initiate a Public Hearing is Presumptively Unreviewable, But Even If the Refusal was Presumptively Reviewable, There is No Substantive Law for a Court to Apply, Which Precludes Judicial Review.

EPA's decision to ignore CARE's petition fell squarely within EPA's statutorily granted discretion and did not constitute a constructive denial of that petition. Multiple circuits have held

that the word "whenever," in both RCRA and other environmental statutes, gives EPA unreviewable discretion in deciding whether to begin proceedings against states for violations of environmental statutes. But even if EPA's refusal to initiate an enforcement action is presumptively reviewable, the lack of substantive law for this Court to apply rebuts that presumption. Because the legislative history and text of RCRA are silent as to when EPA must commence withdrawal proceedings, this Court has not substantive law to apply to review EPA's decision, which precludes judicial review.

1. Withdrawal Proceedings Are an Enforcement Action and the Decision Not to Commence Them is Presumptively Unreviewable

EPA's decision not to commence withdrawal proceedings is a non-enforcement decision that is presumptively unreviewable. *See Heckler v. Chaney*, 470 U.S. 821, 821 (1985). RCRA permits EPA to withdraw authorization of a state's hazardous waste program after it has notified the state of a deficiency in the program and the state has failed to take corrective action within a reasonable amount of time. *See* 42 U.S.C. § 6926(e). To commence withdrawal proceedings, EPA issues an order to which the state must respond in writing within thirty days; an adversarial hearing before an administrative law judge follows. *See* 40 C.F.R. § 271.23(b) (2005). That hearing is generally conducted in accordance with EPA's "consolidated rules of practice governing the administrative assessment of civil penalties and the revocation/termination or suspension of permits." *See id.* § 271.23(b)(3). Therefore, the decision not hold a hearing is "an agency's decision not to invoke an enforcement mechanism provided by statute," and thus "not typically subject to judicial review." *Pub. Citizen,* 343 F.3d at 464.

CARE nevertheless attempts to distinguish *Heckler* by arguing that the decision amounts to a final decision—a constructive denial of their petition. But multiple courts have already applied *Heckler* to similar EPA non-enforcement decisions and have found that the decisions

were unreviewable under the APA. For example, in *Tex. Disposal Sys. Landfill Inc. v. EPA*, 377 Fed. Appx. 406 (5th Cir. 2010), appellants sued in part to force EPA to withdraw Texas' authorization under RCRA for alleged violations of its state plan. *See* 377 Fed. Appx. at 407. After comparing the statute language of "whenever" and "shall" and after examining EPA's regulations, the court held that "EPA's decision not to commence withdraw proceedings is a discretionary, non-enforcement decision that is unreviewable." *Id.* at 408.

In *Ohio Pub. Interest Research Group, Inc. v. Whitman*, 386 F.3d 792 (6th Cir. 2004), the petitioners sued in part over EPA's failure to issue a notice of deficiency to the Ohio Environmental Protection Agency about its implementation of parts of the Clean Air Act ("CAA"). Similarly to this case, section 502(i) of the CAA reads:

> Whenever the Administrator makes a determination that a permitting authority is not adequately administering and enforcing a program, or portion thereof . . ., the Administrator shall provide notice to the State.

42 U.S.C. § 7661(a)(i)(2). The Ohio Public Interest Research Group ("Ohio PIRG") alleged that the Ohio Environmental Protection Agency's program was out of compliance, which the group claimed warranted a notice of deficiency from EPA. After investigation, EPA found that while parts of the program needed improvement, none of the deficiencies warranted a notice of deficiency. *Ohio Pub. Interest Research Group*, 386 F.3d at 795-96. While the Ohio PIRG contended "that the word 'shall' is mandatory, and not permissive, requiring EPA to issue a [notice of deficiency] when inadequacies are found," the court sided with EPA's argument, which was "that the preceding phrase-'Whenever the Administrator makes a determination . . .'-gives it the discretion to make the determination that triggers the statute's obligatory language." *Id*. at 796. Siding with multiple circuits, the court found that EPA's decision not to issue a notice was a decision not to invoke an enforcement mechanism provided by the statute. Thus pursuant

to § 701(a)(2) of the APA, the court held that an administrative agency's decision not to invoke an enforcement mechanism is not subject to judicial review. *Id*. at 797.

As the Sixth Circuit pointed out, in nearly identical cases interpreting the Clean Air Act, the Fifth and Second Circuits have interpreted the "whenever" in the CAA as giving EPA discretion in deciding whether to bring enforcement actions. In *Pub. Citizen, Inc. v. EPA*, 343 F.3d 449 (5th Cir. 2003), the court found that "[w]hile the CAA requires the EPA to issue [a notice of deficiency] when it has determined that a program is not being adequately administered or enforced, this nondiscretionary obligation arises *only after* a discretionary determination by the EPA." *Id.* at 464 (internal quotation and citation omitted). Thus the court held:

> The clear [statutory] language . . . undisputably grants the EPA the authority to initiate the [notice of deficiency] process when it deems doing so appropriate. In other words, Congress left the decision whether, and when, to issue [a notice of deficiency] 'to the institutional actor best equipped to make it.' Accordingly, the EPA's decision not to issue a [notice of deficiency] for the four grounds raised by Petitioners is not subject to our review.

Id. at 464-65.

Likewise, in *N.Y. Pub. Interest Research Group v. Whitman*, 321 F.3d 316 (2d Cir. 2003), the court held similarly, noting that:

> Presumably, Congress could have fashioned a regime under which, for example, an interested party could initiate the process leading to a determination of whether "a permitting authority is adequately administering and enforcing a program." Congress, however, took a different path. Because the determination is to occur whenever the EPA makes it, the determination is necessarily discretionary.

Id. at 331. As the Second Circuit also noted, multiple other circuits have also interpreted similar language in other statutes to grant EPA unreviewable discretion in deciding whether to start enforcement proceedings. *See, e.g., Her Majesty the Queen in Right of Ontario v. EPA*, 912 F.2d 1525, 1533 (D.C. Cir. 1990) (interpreting the Clean Air Act § 502(i) and finding that the word "whenever" granted the EPA Administrator discretion in beginning enforcement proceedings);

Sierra Club v. Whitman, 268 F.3d 898, 902-06 (9th Cir. 2001) (interpreting the Clean Water Act § 1319(a)(3) and rejecting the notion that the EPA Administrator was required to make findings because the word "whenever" provided unreviewable discretion); *Dubois v. Thomas*, 820 F.2d 943, 948 (8th Cir. 1987) (same); *Harmon Cove Condominium Ass'n, Inc. v. Marsh*, 815 F.2d 949, 952-53 (1987) (interpreting the Federal Water Pollution Control Act (FWPCA), section 404, and holding that the word "whenever" provided the EPA Administrator discretion).

2. The Legislative Scheme Provides No Substantive Law for a Reviewing Court to Apply.

Even if the Determination is presumptively reviewable, that presumption is rebutted, because RCRA and EPA's implementing regulations do not provide any substantive law to apply, which is necessary in order for the Determination to be reviewable under *Overton Park*.

The statutory text is entirely silent on when EPA must commence withdrawal proceedings. It directs that EPA "shall withdraw authorization" if it determines that a state program is not equivalent to RCRA's federal regulatory scheme. 42 U.S.C. § 6926(e). But it provides no substantive guidance on when EPA should exercise its discretion to begin the process. The statute only provides that the determination whether a state's hazardous waste program is consistent with RCRA's requirements must be made "after public hearing." *Id.* It is silent on the substance of when EPA should hold a hearing. Nor does RCRA's legislative history provide law to apply on when EPA must exercise its discretion to commence withdrawal proceedings. *See, e.g.*, H.R. Rep. No. 94-1491, at 31 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6238, 6269 ("[I]f the state program . . . becomes not equivalent . . ., the Administrator, after notice and opportunity for the State to have a hearing, is authorized to enforce the federal minimum standards . . . ."). This legislative silence confirms that EPA has discretion to decide when commencement of withdrawal proceedings is appropriate.

Contrary to what CARE argues, EPA's implementing regulations likewise provide no substantive law to apply. They include a list of non-exclusive criteria for which EPA "may withdraw program approval." 40 C.F.R. § 271.22 (2005). However, the use of permissive language reflects discretion, not binding law to apply. *See Tex. Disposal Sys. Landfill Inc. v. EPA*, 377 Fed. Appx. 406, 408 (5th Cir. 2010) ("Neither [RCRA] nor the regulations present standards by which we can review the EPA's decision not to commence withdrawal proceedings.").

Even if the criteria listed in the regulations do provide law to apply, the regulations are for the ultimate decision to withdraw authorization, not the discretionary, inherently prosecutorial decision whether to commence withdrawal proceedings. Simply put, EPA's regulations provide *no* substantive criteria for the decision whether to commence enforcement proceedings, and this confirms EPA's discretion.

CARE also mistakenly argues that EPA's decision was a constructive denial of its claim and that it falls within an exception allowing judicial review where an agency action constitutes an abdication of EPA's responsibilities. However, the exception does not apply. First, the exception does not apply to non-enforcement decisions on which no statutory constraints are imposed. *See, e.g.*, *Heckler v. Chaney*, 470 U.S. 821, 833 n.4 (1985) (stating that in abdication-of-responsibility cases, "the statute conferring authority on the agency might indicate that such decisions were not 'committed to agency discretion'"); *Adams v. Richardson*, 480 F.2d 1159, 1162 (D.C. Cir. 1973) (stating that non-enforcement cases were "distinguishable from the case at bar" because "Title VI not only requires the agency to enforce the Act, but also sets forth specific enforcement procedures"). Second, EPA's decision lacks any cognizable binding legal effect, makes no formal findings about future regulatory actions, and does not require any regulated

entity to change its behavior. Third, the exception is inapplicable where, as here and in *Heckler*, the agency's non-enforcement decision specifically refers to its discretion. CARE cites to *Scott v. City of Hammond*, 741 F.2d 992 (7th Cir. 1984), to support their argument. In *Scott*, the court found that the city's failure to submit Total Maximum Daily Load (TMDL) levels for discharge of pollutants into Lake Michigan amounted to a "constructive submission" of no TMDL's, which it was required to do under the Clean Water Act. Once the city had submitted a TMDL, EPA was statutorily required to either approve or disapprove it; if EPA disapproved, it was statutorily required to set its own TMDL. *Id.* at 997-98. However, as later circuits have interpreted *Scott*, they have narrowly construed the "constructive submission" theory as narrow. See *Hayes v. Whitman*, 264 F.3d 1017, 1024 (10th Cir. 2001) ("The constructive-submission theory that we accept under the Clean Water Act's citizen-suit provision is necessarily a narrow one. It applies only when the state's actions clearly and unambiguously express a decision to submit no TMDL for a particular impaired waterbody."). Additionally, the relevant statutory language of 33 U.S.C. § 1313(d)(1)(A) provides the states no choice on when or whether to enforce the Clean Water Act. In contrast, RCRA clearly provides EPA prosecutorial discretion in determining whether to bring enforcement proceedings. The "constructive submission" theory simply does not apply to the EPA, and no case has been successfully brought against the EPA in federal court alleging a constructive denial of a petition.

Finally, CARE seizes on the fact that the regulations lay out procedures for the withdrawal proceedings. *See* 40 C.F.R. § 271.23. While courts may always review an agency's compliance with its own procedures, procedural regulations do not provide courts substantive law to apply for judicial review of other matters. *See Ellison v. Connor*, 153 F.3d 247, 252 (5th Cir. 1998). But EPA followed all required procedures. This Court does not have subject matter

jurisdiction to review the inherently discretionary decision not to initiate enforcement proceedings.

III. IF THIS COURT FINDS CONSTRUCTIVE DENIAL OF CARE'S PETITION, IT SHOULD REMAND FOR FURTHER PROCEEDINGS AS RCRA DEMANDS

Even if this Court decides that EPA's decision not to initiate enforcement proceedings is a reviewable action, this Court should not lift the stay, but should rather remand the action to the lower court with instructions to have EPA initiate and complete proceedings in conjunction with 40 C.F.R. § 271.23.

A. Standard of Review.

As discussed in, *supra*, Section I, EPA has consistently used its rulemaking authority, not its ability to issue orders, to approve RCRA programs for each individual state. *See, e.g.*, 75 FR 9,345 (approving Michigan's RCRA program using rulemaking authority).

Rules promulgated under the APA's informal rulemaking authority, 5 U.S.C. § 553 (1976), are accorded deference. These rules are only set aside if they are found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 41 (1983).

B. Remand is Warranted.

This Court should remand because it is what RCRA requires; ordering the immediate withdrawal of authorization would itself violate RCRA. RCRA requires a "public hearing" to determine that New Union "is not administering and enforcing a program authorized under this section in accordance with requirements of this section." 42 U.S.C. § 6926(e). After determining that New Union is indeed not in compliance, the EPA Administrator "shall so notify the State" in order to give "a reasonable time, not to exceed ninety days," to the state to take "appropriate corrective action." *Id.* Only then shall the Administrator "withdraw authorization

of such program and establish a Federal program pursuant to this subchapter. *The Administrator shall not withdraw authorization of any such program unless he shall first have notified the State, and made public, in writing, the reasons for such withdrawal.*" *Id.* (emphasis added). Because of this clear statutory language, the court should remand the case to the lower court for action not inconsistent with 42 U.S.C. § 6926(e).

These procedures have not been followed. If EPA did in fact constructively deny CARE's petition, it do so in an arbitrary and capricious manner because it did not follow any of the procedures required in 42 U.S.C. § 6926(e). The only way to rectify these procedural errors is to remand the case back to the district court with instructions for EPA to follow the statutory procedures.

IV. EPA IS NOT REQUIRED TO WITHDRAW ITS AUTHORIZATION OF NEW UNION'S RCRA PROGRAM EVEN IF A CONSTRUCTIVE DENIAL OCCURRED.

RCRA encourages state agencies to assume primary responsibility for regulating hazardous waste, permitting states to apply to the EPA Administrator to create and enforce their own hazardous waste programs. 42 U.S.C. § 6926(b). Once a state program has been approved by EPA, the state program operates "in lieu" of the federal program, with EPA assuming a secondary enforcement role. The existence of a state RCRA program does not preclude EPA from bringing RCRA enforcement actions, or from issuing RCRA permits, provided that the state has been given notice and opportunity to bring an enforcement action or issue a permit under its own authority. *See United States v. Power Eng'g Co.,* 303 F.3d 1232, 1237-38 (10th Cir. 2002); *Harmon Indus., Inc. v. Browner,* 191 F.3d 894, 901-02 (8th Cir. 1999). State RCRA programs must be as strong or stronger than the federal RCRA baseline. 42 U.S.C. §§ 6926(b) & 6929.

EPA has a wide variety of tools to supplement state RCRA programs. EPA can revoke RCRA permits issued by state programs, pursue enforcement actions against violators of state RCRA programs, and can issue permits to facilities in authorized states, among other things. 42 U.S.C. § 6925(d) (revocation of permits); 42 U.S.C. § 6928(a) (enforcement actions); 40 C.F.R. § 271.19(f) (2005) (issuance of permits). EPA is required to withdraw a state RCRA program's authorization if EPA finds that a state RCRA program no longer conforms to the Federal standard. 42 U.S.C. § 6926(e). "The withdrawal of federal authorization is obviously an extreme step, one that requires the Administrator to establish a federal program to replace the repudiated state program." *Waste Mgmt. of Ill., Inc. v. EPA*, 714 F. Supp. 340, 341 (N.D. Ill. 1989). The decision to commence withdrawal proceedings, however, is discretionary on the EPA Administrator, who "may order the commencement of withdrawal proceedings on his or her own initiative or in response to a petition from an interested person alleging failure of the State to comply with the requirements of this part." 40 C.F.R. § 271.23(b)(1) (italics added).

Authorization removal, once the EPA has decided to commence withdrawal proceedings, is a three-step process: first, the EPA must file a complaint against the state's program and give the state a chance to respond to the EPA's allegations; second, public hearings occur before an Administrative Law Judge, who determines on the record whether the state's program has indeed violated RCRA; third, the ALJ submits a proposed decision to the Administrator, who issues a final decision based on the ALJ's record. The Administrator's decision is a final agency action which may be appealed to the courts under the Administrative Procedure Act, 5 U.S.C. § 704. If EPA finds that the state RCRA program is not consistent with the federal program, the state then gets 90 days to correct its failings; if the state does not correct its failings, EPA must withdraw

the state program's authorization, using any of the criteria specified in 40 C.F.R. § 271.22. 42 U.S.C. § 6926(e).

A. EPA's Constructive Determination that New Union Has Not Failed to Exercise Control Over Activities "Required to be Regulated" Because it Has Sufficient Resources to Conform to the Federal RCRA Standard is Entitled to Administrative Deference.

When an agency interprets its own rules, the agency's interpretation receives judicial deference unless the interpretation is "plainly erroneous or inconsistent with the regulation." *See Auer v. Robbins,* 519 U.S. 452, 461 (1997) (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945). Under the applicable regulations, the Administrator may withdraw approval of New Union's RCRA program, if the operation of said state RCRA program includes: "i) Failure to exercise control over activities required to be regulated under this part, including failure to issue permits; (ii) Repeated issuance of permits which do not conform to the requirements of this part; or (iii) Failure to comply with the public participation requirements of this part." 40 C.F.R. § 271.22(a)(2).[2] Assuming, arguendo, that the Administrator had made such a constructive determination, EPA, is entitled to deference in its interpretation of its own regulations. *See Auer*, 519 U.S. at 462. The fact that EPA's formal opinion comes in the form of this brief is of no matter. *Id.* at 461.

The key phrase in EPA's regulations is whether New Union has "[failed] to exercise control over activities required to be regulated." 40 C.F.R. § 271.22(a)(2)(i). EPA's interpretation of this regulation in the instant case is that New Union DEP never affirmatively failed to exercise overall control over hazardous waste, despite the financial constraints facing New Union. (Rec. doc. 4 for 2009, p. 24.) The decision whether to interpret the action of New Union's DEP as "failure" or not, however, is fully discretionary. 40 C.F.R. § 271.22(a)

[2] Appellants have made no claim that any violation of 40 C.F.R. § 271.22(a)(2)(ii) or (a)(2)(iii) has occurred.

stipulates: "The Administrator *may* withdraw program approval when a State program no longer complies with the requirements of this subpart, and the State fails to take corrective action." The regulation uses "*may*," rather than "*shall*," implying a discretionary, rather than mandatory duty. *See, e.g., United States v. Monsanto,* 491 U.S. 600, 607 (1989) (stating that "shall" usually implies mandatory duty); *United States v. Rodgers,* 461 U.S. 677, 706 (1983) (stating that unless legislative intent indicates to the contrary, "may" implies discretionary duty).

EPA's purported constructive determination is neither erroneous nor unreasonable in light of the alternative. Rather than throwing out the baby with the bathwater, EPA's decision to assist New Union with its enforcement, permitting and inspection regime is not only contemplated by RCRA and its applicable regulations, but encouraged. *See, e.g.,* 42 U.S.C. § 6928(a) (enforcement actions); 40 C.F.R. § 271.19(f) (issuance of permits); 40 C.F.R. § 271.8(b)(3) (inspections); (Rec. doc. 4 for 2009, p. 23.) In other words, the Administrator decided it was better for EPA to employ its limited resources to bolster the existing New Union RCRA program rather than to assume direct primary regulatory responsibility for the entirety of New Union's RCRA program.

B. The New Union Environmental Regulatory Adjustment Act's Treatment of Railroad Hazardous Waste Is Not Inconsistent with the Federal RCRA Program Because New Union's Reduced Penalty Scheme is Permissible.

EPA does not dispute the fact that the New Union ERAA provides for significantly reduced consequences for railroad-related environmental violations compared to federal law. It is altogether common for states to have weaker penalties for RCRA program violations than the federal standard. California, for instance, provides for up to one year's imprisonment for knowingly transporting hazardous waste without a permit; RCRA provides for up to two years' imprisonment for the same offense. *Compare, e.g.,* 42 U.S.C. § 6928(d) *with* Cal. Health & Safety Code § 25189.5(c). Likewise, in Idaho, a person who makes materially false statements

on a RCRA manifest faces up to a year in jail plus civil penalties per violation; the corresponding federal RCRA provision provides for up to two years' imprisonment and fines of up to $50,000. *Compare, e.g.*, 42 U.S.C. § 6928(d) *with* Idaho Admin. Code r. 58.01.05.850. The joint federal-state nature of RCRA means that EPA can, and does, pursue criminal enforcement action for violations of federal law, despite the existence of a parallel penalty scheme under state law and the RCRA language stating state RCRA programs operate "in lieu of the Federal program." 42 U.S.C. § 6926(b); *United States v. Elias*, 269 F.3d 1003, 1011 (9th Cir. 2001).

In all cases, "the federal government retains both its civil and its criminal enforcement powers . . . what changes . . . is the sovereign from whom generators must obtain the necessary permit originally." *Elias*, 269 F.3d at 1013. Even if the state law scheme uses "significantly less stringent penalties," as in the case of New Union, the federal government is still permitted to prosecute to the extent permitted by the federal RCRA statute for violations of the state program. *See United States v. Flanagan*, 126 F. Supp. 2d 1284, 1291-92 (C.D. Cal. 2000).

C. The New Union Environmental Regulatory Adjustment Act's Treatment of Pollutant X Is Consistent With RCRA.

RCRA explicitly permits state programs to regulate hazardous waste more stringently than the federal RCRA standard. 42 U.S.C. § 6929.[3] There are two ways relevant to the instant case that a state's hazardous waste policy can become inconsistent with RCRA through excessively strict regulation. First, "[a]ny aspect of the State program which unreasonably restricts, impedes, or operates as a ban on the free movement across the State border of hazardous wastes from or to other States for treatment, storage, or disposal" is barred. 40 C.F.R. § 271.4(a) (2005). Second, regulations that have "no basis in human health or environmental

[3] "Nothing in this title shall be construed to prohibit any State or political subdivision thereof from imposing any requirements, including those for site selection, which are more stringent than those imposed by such regulations."

protection and which [act] as a prohibition on the treatment, storage or disposal of hazardous waste in the State" are also barred. 40 C.F.R. § 271.4(b) (2005).

1. New Union's Pollutant X law does not unreasonably impede the free movement of waste.

The first section, which prohibits unreasonable limitations on the free movement of hazardous waste, essentially codified the Supreme Court decision in *City of Philadelphia v. New Jersey,* 437 U.S. 617, 628-29 (1978). EPA's explanation for the rule was that "any aspect of a State program which operates as a ban on the interstate movement of hazardous waste is automatically inconsistent [with RCRA]." Consolidated Permit Regulations, 45 Fed. Reg. 33,290, 33,395 (May 19, 1980).[4] In *Philadelphia,* the Supreme Court had held that regulations that facially discriminated against out-of-state waste were presumptively unconstitutional under the Dormant Commerce Clause. *Philadelphia,* 437 U.S. at 628-29.

There is no such discrimination in the instant case, as New Union does not distinguish between in-state and out-of-state Pollutant X. Rather, New Union treats both in-state and out-of-state transporters of Pollutant X identically, by requiring them to move through the state as reasonably quickly as possible. (Rec. doc. 4 for 2000, pp. 105-107.) The Supreme Court explicitly endorsed these types of laws in *Philadelphia*: "We assume New Jersey has every right to protect its residents' pocketbooks as well as their environment. And it may be assumed as well that New Jersey may pursue those ends by slowing the flow of *all* waste into the State's remaining landfills, even though interstate commerce may incidentally be affected." *Philadelphia,* 437 U.S. at 626. Just as New Jersey is permitted to close its landfills entirely to stop the influx of trash, so, too, can New Union ban Pollutant X and refuse to construct disposal facilities for it—so long as there is no discrimination between in-state and out-of-state waste.

[4] EPA's interpretation of 40 C.F.R. § 271.4 also entitled to deference under *Auer,* as the administering agency's interpretation of its own regulations. *Auer,* 519 U.S. at 462.

2. New Union's Pollutant X law does not have "no basis in human health or environmental protection."

The second subsection of 40 C.F.R. § 271.4 likewise deals with protectionism, not strict state RCRA programs. When EPA drafted section 271.4, it wrote: "A State that refuses entirely to allow a necessary part of national commerce — the disposal of hazardous wastes — to take place within its boundaries is impeding the flow of interstate commerce just as much as a State that refuses to allow the transportation of those wastes. . . . Accordingly, State programs which contain provisions that prohibit treatment, storage or disposal of hazardous waste within the State, will be deemed inconsistent if the prohibition has no basis in human health or environmental protection." Consolidated Permit Regulations, 45 Fed. Reg. at 33,395.

The New Union statute meets this standard. As recognized by the EPA itself and the World Health Organization, Pollutant X is one of the most dangerous chemicals in existence, and there is no viable way of storing or treating it in New Union. (Rec. doc. 4 for 2000, pp. 105-107.) Recognizing the danger Pollutant X poses to public health and safety, the New Union legislature banned the chemical outright. *Id.* Plaintiff does not contest that Pollutant X poses a threat to public health or the environment; it is therefore not contested that the New Union statute has a clear basis in environmental protection and public health. The statute should thus survive the tests of 40 C.F.R. § 271.4.

D. The New Union Environmental Regulatory Adjustment Act's treatment of Pollutant X is consistent with the Commerce Clause.

RCRA waste is an article of commerce. *See Chem. Waste Mgmt., Inc., v. Hunt*, 504 U.S. 334, 346-48 (1992). Courts apply a two-step analysis to determine whether the state statute at issue impermissibly regulates commerce, in violation of Commerce Clause. As mentioned above, States cannot discriminate against articles of commerce based on their origin, unless Congress has specifically empowered the States to do so. *See Philadelphia*, 437 U.S. at 628-29

(solid waste); *Hardage v. Atkins,* 528 F.2d 1264, 1266-67 (10th Cir. 1978) (hazardous waste). *Philadelphia,* however, does permit states to maintain so-called quarantine laws that restrict "the traffic of noxious articles," such as "diseased [livestock] that required destruction as soon as possible because their very movement risked contagion and other evils." *Philadelphia,* 437 U.S. at 628-29; *see also Bowman v. Chicago & Nw. Ry. Co.*, 125 U.S. 465, 489 (1888) ("Doubtless the States have power to provide by law suitable measures to prevent the introduction into the States of articles of trade, which, on account of their existing condition, would bring in and spread disease, pestilence, and death.").

If there is no facial discrimination between out-of-state and in-state waste, satisfying *Philadelphia,* the case proceeds to a second test. "Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on commerce are only incidental, it will be upheld unless the burden imposed on local commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970); *see also Houlton Citizens' Comm'n v. Town of Houlton,* 175 F.3d 178, 185 (1st Cir. 1999) (applying *Pike* to waste). The New Union statute in question meets all three prongs of the *Pike* test.

1. The New Union statute does not discriminate facially against out-of-state waste.

New Union does not distinguish between in-state and out-of-state Pollutant X. Rather, New Union treats both in-state and out-of-state transporters of Pollutant X identically, by requiring them to move through the state as reasonably quickly as possible. (Rec. doc. 4 for 2000, pp. 105-107.) The Supreme Court explicitly endorsed these types of laws in *Philadelphia*: "We assume New Jersey has every right to protect its residents' pocketbooks as well as their environment. And it may be assumed as well that New Jersey may pursue those ends by slowing the flow of *all* waste into the State's remaining landfills, even though interstate commerce may

incidentally be affected." *Philadelphia*, 437 U.S. at 626. The New Union statute does exactly what the Supreme Court prescribed in *Philadelphia*: it banned all Pollutant X, affecting in-state and out-of-state producers equally.

2. The New Union statute meets the test for local regulation set forth in *Pike*.

"Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on commerce are only incidental, it will be upheld unless the burden imposed on local commerce is clearly excessive in relation to the putative local benefits." *Pike*, 397 U.S. at 142.

There is a legitimate local public interest which regulates evenhandedly with no protectionist bias. The State of New Union has a duty to protect the public from dangerous substances like Pollutant X, and the state has managed to do so without protectionist or discriminatory measures that might violate *Philadelphia*. *See Chem. Waste Mgmt.* 504 U.S. at 343 (striking down local ordinance where no basis in public health was found). Likewise, the New Union legislature has recognized that Pollutant X poses a grave danger to public health and safety, and has therefore prohibited its generation within the state of New Union altogether.

The impact on interstate commerce and intrastate commerce is minimal. Only minimal amounts of Pollutant X are generated in New Union, and there are no disposal facilities available in New Union. (Rec. doc. 4 for 2000, pp. 105-107.) There is little reason for a transporter of Pollutant X to stop in New Union, except to refuel, rest, and re-supply.[5]

[5] The requirement that transporters of Pollutant X travel as reasonably quickly as possible through the state is permissible and complies with applicable provisions of federal transportation law. *See Nat'l Tank Truck Carriers, Inc. v. City of New York*, 677 F.2d 270, 274-75 (2d Cir. 1982).

E. EPA Is Not Required to Withdraw Its Approval of New Union's RCRA Program Even if Non-Compliance Is Found.

RCRA grants EPA wide enforcement and permitting latitude to compensate for deficiencies in state RCRA programs, with de-authorization proceedings an absolute last resort, only to be begun at the discretion of the Administrator. "Nothing in the text [of RCRA] suggests that such [deauthorization] is a prerequisite to EPA enforcement or that it is the only remedy for inadequate enforcement." *Power Engineering,* 303 F.3d at 1239. The existence of alternative remedies, including concurrent enforcement, inspections, and permitting actions in order to shore up state RCRA programs confirms this. New Union's RCRA program may underfunded, but that is no reason to throw out the works and start afresh.

CONCLUSION

For the foregoing reasons, EPA respectfully request that this Court reverse the district court's grant of summary judgment with respect to its holding that it lacked jurisdiction over CARE's petition under 42 U.S.C. § 6972, but uphold that it lacked jurisdiction over CARE's petition under 28 U.S.C. §1331.